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Supreme Court of the United States

OCTOBER TERM, 1964

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN,
Petitioner,

v.

CENTRAL OF GEORGIA RAILWAY COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 14, 1965

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW AND JURISDICTION

The opinions of the courts below are adequately described, and the jurisdictional basis for the Petition adequately set forth, in the Petition, p. 2.

QUESTION PRESENTED

Whether the Order of the Interstate Commerce Commission in Finance Docket 21,400, *Southern Ry. Co.-Control-Central of Georgia Ry. Co.*, 317 I.C.C. 557 (1962), authorized Southern Railway Company and respondent Central of Georgia Railway Company to consolidate their railroad-yard operations at Macon and Atlanta, Georgia, and Chattanooga, Tennessee.

STATUTES INVOLVED

In addition to those sections of the Interstate Commerce Act printed in the Appendix to the Petition (pp. 28-31), Section 5(2)(f) of that Act, 49 U.S.C. § 5(2)(f), is also involved in this case. Section 5(2)(f) is set forth in Appendix A to this Brief, p. 17, *infra*.

STATEMENT OF THE CASE

The issue in this case turns entirely on the meaning of a particular order of the Interstate Commerce Commission, entered on December 3, 1962. It will therefore be appropriate to begin by summarizing the events that led up to the order in question, and the judicial proceedings to which it has given rise.

The case began on December 15, 1960, when Southern Railway Company filed an application with the Commission under Section 5(2) of the Interstate Commerce Act for authority to acquire stock control of respondent Central of Georgia Railway Company. Central intervened in support of this application, and Railway Labor Executives' Association, of which petitioner's officers were members and which acted on behalf of Southern's and Central's employees, including

members of petitioner, intervened in opposition. It will be helpful to have in mind a number of facts developed at the hearing on this application, facts that are not disputed by the instant Petition.

Central is a small railroad. For most of the last 32 years it has been controlled either by a receiver, a trustee in bankruptcy, a voting trustee, or stock speculators. It was subject to overwhelming competition from a number of surrounding major railroads. See *Southern Ry.-Control-Central of Georgia Ry.*, 317 I.C.C. 557, 560-62 (1962) (the Report of the I.C.C. in this case). Central had, in fact, become a marginal carrier and had been forced to give up necessary programs of equipment modernization and maintenance. *Id.* at 560. In spite of the fact that Central was not keeping pace with technological developments in the industry, unemployment on its lines was increasing 35% faster than the industry average, because of its reduced earnings.

Much of the hearings revolved around the economies through consolidation of duplicate facilities that the proposed stock acquisition would make possible. These economies were emphasized by Southern and Central as reasons in support of the application. The adverse effect on Central employees resulting from the planned consolidations was strongly urged by RLEA as reason for denying the application. In the alternative, RLEA asked that the proposed consolidations' effect on employees whose interests it represented be mitigated by the imposition, under Section 5(2)(f) of the Interstate Commerce Act, of an extensive system of labor-protective conditions designed to compensate adversely affected employees. In discussing the projected

modernizations, improvements, and consolidations, the Hearing Examiner mentioned, among others, the very steps of which petitioner now complains:

> "Central's yards at Atlanta, Macon, [and] Chattanooga . . . would be consolidated into Southern's more modern yards at those . . . points. . . ." R. 215.[1]

The Examiner then went on to detail the savings that would result from these yard consolidations. R. 217. After considering these and other financial benefits that the proposed transaction would produce, he recommended that it be approved as in the public interest.

The case then went before the Commission itself. Again the issues revolved around consolidations of facilities that the proposed acquisition of control would make possible, with the opposing labor organization emphasizing the allegedly injurious effect of these consolidations on the affected carriers' employees. The Commission issued its report approving the proposed transaction on November 7, 1962. It first noted that "the proposed transaction will result in improved service to the public and in the effectuation of substantial economies." 317 I.C.C. at 560; R. 177. It then listed the expected economies, including "consolidation of yard facilities. . . ." *Ibid.* It attached to its report, as Appendix I, excerpts from the Hearing Examiner's report, including the passage already quoted referring expressly to the consolidations placed in issue by the Petition herein. 317 I.C.C. at 570, 579; R. 196, 215. And, most important of all, the Commission thoroughly described the effects that the proposed transaction

[1] This citation is to the printed record in the Court of Appeals in this case, nine copies of which were filed with the Petition.

would have on Southern's and Central's employees. It said:

"'Employees.—Applicant estimates that *the proposed consolidation* of the Central's freight agencies, yards, shops and accounting department into those of applicant will result in the elimination of between 814 and 824 jobs held by Central employees and 4 held by applicant's employees. The association questions this estimate, but the number of jobs to be affected by the proposed consolidations is a matter under the control of applicant and concerning which its officers have more accurate information. Accordingly, we accept its estimate as substantially correct. We recognize, however, as pointed out by the association, that the number of employees who would be affected, no doubt, would exceed the number of jobs abolished, because of the so-called bumping process under which, through the exercise of seniority rights established by collective bargaining agreements, an employee whose position is abolished may displace another, who in turn may displace an employee junior on the seniority roster involved, and so on.

"Consummation of *the proposed transaction* unquestionably will result in substantial hardship to many employees and their families. However, we are not persuaded that the application should be denied for this reason. While the number of available jobs will be reduced, at least temporarily, the remaining jobs will be made more secure. In this connection, it is noteworthy that, without any coordination *such as that planned*, the average number of persons employed by the Central has been reduced from 6,737 in 1945 to 3,421 in 1960. The future of all the employees of the Central is far from bright unless this trend can be arrested. Affiliation of the Central with applicant will strengthen its ability to render adequate and

efficient service and to continue its operations on a sound financial basis. Some such affiliation appears necessary to avoid further deterioration in its earnings and competitive position and, possibly, insolvency." 317 I.C.C. at 562; R. 180-81 (emphasis supplied).

With these consolidations and labor effects in mind, the Commission found that the proposed acquisition would be in the public interest and issued an order approving it. This order, issued on December 3, 1962, expressly incorporated by reference the report of November 7, 1962, R. 244, and authorized the consummation of the proposed transaction "in the manner and upon the terms and conditions in the report aforesaid found just and reasonable . . . ." R. 245.

The approval thus granted by the Commission was conditioned on a thorough-going system of conditions designed to compensate employees who would be adversely affected by the proposed consolidations. The conditions imposed included, in summary, the following:

(1) Employees displaced or dismissed by reason of the acquisition will receive full monetary compensation for four years after the effective date of the order approving the transaction, or for the period of their service prior to that date, if that period is less than four years.

(2) This compensation will include moving expenses and losses on the sale of homes at less than fair value.

(3) Compensation will also be made for any loss of fringe benefits not shared by all similarly situated employees.

(4) The compensation thus described is a minimum; any employee who at the end of the four-year protective period shall have received less compensation than the total amount he would have received under the Washington Agreement, a private contract not here involved, shall thereafter continue to receive additional compensation until the difference shall have been paid.

(5) At RLEA's request, any dispute over the application of these conditions will be subject to compulsory and binding arbitration.

RLEA petitioned for reconsideration of the order of December 3, 1962, but on June 10, 1963, the petition was denied in all respects here pertinent, 317 I.C.C. 729, and on June 14, 1963, the order authorizing the instant transaction became final.[2] Promptly on receipt of the Commission's second order, Southern and Central proceeded to put into effect the planned consolidations. On June 17, 1963, they consolidated the Southern and Central yard facilities at Macon, Atlanta, and Chattanooga. Central employees at those yards, as expected, were offered employment with Southern, with a consequent loss of seniority. Employees monetarily injured by this action are now

[2] Prolonged litigation, not yet finally resolved, ensued concerning the scope of the labor-protective conditions. These conditions were upheld against challenge by RLEA, Railway Labor Executives' Ass'n v. United States, 226 F. Supp. 521 (E. D. Va. 1964), but on appeal this Court summarily remanded the case to the Commission for consideration of whether to include in its conditions certain provisions of the private contract (not here involved) known as the Washington Agreement. 379 U.S. 199 (1964). This phase of the case is now before the Commission on remand, and as of this writing the Commission had not yet taken any action thereon.

being compensated pursuant to the labor-protective conditions that the Commission had imposed. Southern and Central have to date paid affected employees, including members of petitioner union, over $4 million under these conditions.

Meanwhile, on June 26, 1963, petitioner brought this suit in the United States District Court for the Middle District of Georgia against Central. It alleged that it was a party to a collective-bargaining agreement with Central executed on January 1, 1954. It then claimed that the yard consolidations described above were an attempt to change rates of pay, rules, and working conditions of employees respresented by it without following the procedures required by Sections 2, Seventh and 6 of the Railway Labor Act, 45 U.S.C. §§ 152, Seventh, 156. Petitioner asked the District Court to issue a mandatory injunction undoing the already consummated yard consolidations, and restoring in all respect the *status quo ante* June 17, 1963. R. 43. After transfer to the Northern District of Georgia, petitioner's complaint was dismissed by that Court.

On appeal, the Court below affirmed unanimously. In an opinion by Chief Judge Tuttle, the Court held, first, that the Commission orders had not been limited, as claimed by petitioner, to a mere authorization for Southern to acquire legal title to Central stock. The Court was of the opinion that the Commission's orders, when considered in context, also authorized consolidation of the yards in question. The Court held, further, that even if the Central's conduct thus authorized by the Commission were a violation of existing collective-bargaining agreements, the case was still merely a "minor dispute," within the exclusive primary jurisdiction of the National Railroad Adjustment Board

under Section 3, First (i) of the Railway Labor Act, 45 U.S.C. § 153, First (i). This Petition followed.[3]

ARGUMENT

Petitioner does not claim any conflict among the circuits, and none exists. The Petition attempts to portray this case as involving issues under Section 1(18) of the Interstate Commerce Act, 49 U.S.C. § 1(18), and decisions of this Court requiring permission from the Interstate Commerce Commission for certain railroad consolidations. Pet., pp. 3, 13-14. In fact, no such issues are presented. The issue in this case is simply whether yard consolidations in three cities were authorized by a particular order of the Commission. Petitioner's case depends wholly on the thesis that there was no such authorization, and the Petition implicitly concedes that if there was such authorization the Court below was correct in affirming dismissal of the complaint. Thus, no large issues of statutory construction are presented. The questions in this case are of importance only to the parties. Obviously the construction of a single Interstate Commerce Commission order does not even approach the magnitude necessary to make a claim on this Court's time. Even if the Court of Appeals had been wrong (which it was not), therefore, there would be no occasion to grant certiorari in this case. Further, the Court of Appeals was clearly correct, as can be demonstrated in brief compass.

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[3] The Court's opinion also disposed, on similar grounds, of the appeal in a companion case brought by the Brotherhood of Locomotive Engineers. Certiorari has not been sought in this case. Two other cases arising out of Southern's acquisition of Central were also before the Court of Appeals. One was decided by the same opinion as disposed of the instant case, and one was dealt with in a separate opinion. See Brotherhood of Ry. & S.S. Clerks v. Southern Ry. Co., 341 F.2d 217 (5th Cir. 1965). Certiorari has likewise not been sought in these latter two cases.

1. The Interstate Commerce Commission's Order of December 3, 1962, Authorized the Yard Consolidations in Question Here.

We start with the proposition that the purpose of Section 5(2) of the Interstate Commerce Act, under which the order at issue here was entered, was to encourage certain "transactions" by rail carriers that would result in increased economy and efficiency in the national transportation system. As this Court recently remarked,

> " 'The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act, enacting § 5(2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system.' *County of Marin* v. *United States*, 356 U.S. 412, 416." *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

At the same time, it was recognized that the "transactions" sought to be encouraged would likely have an adverse effect on employees. Section 5(2)(c)(4) requires that the Commission, in deciding whether a proposed "transaction" is in the public interest, take into account adverse effects on employees. And Section 5(2)(f) requires the Commission, in the event of approval, to impose upon the "transaction" conditions for the protection of affected employees. The type of "transaction" involved here is a stock acquisition. See Section 5(2)(a)(i), 3d clause.[4] As part of this "transaction," certain yard consolidations have been put into

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[4] This clause reads: "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—(i) . . . for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . ."

effect, certain employees, including members of petitioner, have been displaced or dismissed, and compensation is being paid pursuant to the Commission's order. The Congress deemed it necessary for the Commission to approve and authorize the acquisition by one carrier of control of another, because the Congress realized that in exercising control as a majority stockholder, such carrier would have the right to exercise those rights of corporate management which are inherent and legal attributes of majority control of a corporation. Section 5(2)(f) was therefore made by Congress to apply to acquisitions of control as well as to consolidations or mergers.

Petitioner's argument is that the "transaction" approved was strictly limited to an acquisition by Southern of stock in Central. It included nothing more, according to Petitioner, and the carriers must return to the Commission, make another application, conduct additional hearings, and probably bear the burden of further litigation, if the national transportation system is to get any economic benefit out of the stock acquisition. To support this narrow and strained construction, petitioner points to the language of the order of December 3, 1962, approving "the acquisition by the Southern Railway Company of control of the Central of Georgia Railway Company . . . through ownership of a majority of the capital stock of the Central of Georgia Railway Company. . . ." Pet., p. 4. The very passage quoted by petitioner goes on, however, to add that the acquisition shall be made "in the manner and upon the terms and conditions in the report aforesaid [the report of November 7, 1962] found just and reasonable . . . ." *Ibid.* The order also expressly incorporates by reference this entire report. R. 244.

And the report, as already explained at length, pp. 3-7, *supra*, discussed in detail the economies and consolidations that would follow the proposed stock acquisition. Indeed, it was these economies, including the very yard consolidations here complained of, that caused the Commission to approve the instant "transaction" in the public interest.

Petitioner's position, furthermore, makes nonsense of the discussion of employee effects in the Commission's report, and of its careful prescription of conditions to compensate affected employees. A mere stock acquisition, without more, does not displace any employee, or cause anyone's dismissal. These effects result from consolidations and economies made possible by the stock acquisition. If the Commission's authorization had been limited to the bare acquisition, there would have been no occasion to prescribe employee protection. And under petitioner's theory, all the extensive litigation over the scope of this protection, including this Court's decision in *Railway Labor Executives' Ass'n* v. *United States*, 379 U.S. 199 (1964) (per curiam), is merely a sterile and nugatory exercise in futility. There is no need to litigate over protection for employees affected by consolidations, petitioner would say, for no consolidations have ever been authorized.

A reading of the Commission's report reinforces the conclusion that the consolidations were authorized. Nowhere does it limit the "transaction" to a bare acquisition of capital stock. It repeatedly refers to the "transaction" as encompassing consequent economies and consolidations, including the three yard consolidations that produced this case. *E.g.*, 317 I.C.C. at 562;

R. 180-81. As the United States District Court for the Eastern District of Virginia said of this "transaction,"

> "The Commission, in approving the *transaction,* was fully advised of the proposed consolidation of Central's freight agencies, *yards,* shops and accounting department into those of Southern, together with the *resultant job losses* entailing substantial hardship to many employees and their families. In the alleviation of these hardships the Commission imposed conditions for the protection of the employees thus affected . . . ." *Railway Labor Executives' Ass'n* v. *United States,* 226 F. Supp. 521, 522 (E. D. Va.), *vacated and remanded per curiam on other grounds,* 379 U.S. 199 (1964) (footnote omitted; emphasis supplied).

The fact is that the word "transaction," as commonly used and as employed in Section 5(2) of the Interstate Commerce Act, refers to all "the many different elements involved in mergers, leasing agreements, pooling arrangements, or joint operations," *Texas & N.O.R. Co.* v. *Brotherhood of R.R. Trainmen,* 307 F. 2d 151, 159 (5th Cir. 1962), *cert. denied,* 371 U.S. 952 (1963), necessarily including railroading economies that will be an integral part of the "transaction."

It is thus clear that the yard consolidations involved in the case at bar were authorized by the Commission. Given this premise, it follows inevitably—and the Petition appears to concede, see p. 15—that respondent Central of Georgia had a right to consolidate its yards at Macon, Atlanta, and Chattanooga with Southern's facilities there, and to discharge employees in order to make these consolidations, notwithstanding any pro-

visions of the Railway Labor Act. Section 5(11) of the Interstate Commerce Act provides that the Commission's authority under Section 5 is "plenary and exclusive," and that

> "any carriers . . . participating in a transaction approved or authorized under the provisions of [Section 5] . . . shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for . . . ."

In other words, Central, having been authorized by a Section 5 order to consolidate these three railroad yards with Southern, was *pro tanto* relieved from any prohibitions or requirements that might otherwise be imposed by the Railway Labor Act. See *Schwabacher* v. *United States,* 334 U.S. 182 (1948); *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry. Co.,* 314 F. 2d 424 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963).

2. Certiorari Should Also be Denied Because the Court of Appeals' Decision is Supportable on an Alternative Ground.

Even if petitioner's construction of the Commission's order of December 3, 1962, were correct, and even if this question were of national importance, this case would still not be an appropriate one for exercise of the certiorari power. For the Court of Appeals' decision affirming dismissal of the complaint is also supportable on an alternative ground involving only a routine application of settled Railway Labor Act doctrine.

Assuming that the Railway Labor Act applies to these consolidations, nothing was done to warrant invocation of Section 6 of that statute. That provision applies only to "major disputes," involving unilateral attempts to change collective-bargaining agreements. Central has not tried and does not desire to make any such change in its agreement of January 1, 1954, with petitioner. The agreement remains valid and fully applicable in respect of employees of Central represented by petitioner. Central has simply discharged some of those employees as part of a consolidation program, at the same time seeing to it that the discharged workers had an opportunity for employment with Southern. If work has thus been improperly "contracted out," or if seniority rights have been adversely affected, there has been, at worst, merely a violation of the agreement of January 1, 1954, giving rise to a "minor dispute." Such disputes, under familiar principles, are within the exclusive primary jurisdiction of the National Railroad Adjustment Board. See, *e.g., Brotherhood of R.R. Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957); *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U.S. 711 (1945); *St. Louis, S.F. & T. Ry. Co.* v. *Railroad Yardmasters*, 328 F. 2d 749 (5th Cir.), *cert. denied*, 377 U.S. 980 (1964).

CONCLUSION

The decision below is plainly correct. In addition, this case involves no conflict among the circuits or important issues of statutory construction. It concerns only the construction of a particular order of the Interstate Commerce Commission, or, in the alternative, the application of traditional Railway Labor Act

principles to particular facts. Certiorari should be denied.

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APPENDIX A

"(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this Chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 49 U.S.C. § 5(2)(f).